UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

05-CR–060 (NGG)

UNITED STATES OF AMERICA,

Plaintiff,

- versus –

VINCENT BASCIANO,

Defendant.

Before: **Honorable Nicholas G. Garaufis**, U.S.D.J.

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR VIOLATIONS OF THE CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL AND THE SPEEDY TRIAL ACT

GEORGE GOLTZER, ESQ
200 West 57th St.
Suite 900
New York, New York 10019
Tel: 212.608.1260
Fax: 212.980.2968
george@goltzer.com

RICHARD JASPER, ESQ
276 Fifth Avenue
Suite 501
New York, New York 10001
Tel: 212.689.3858
Fax: 212.689.0669
ricjasp@aol.com

YING STAFFORD, ESQ.
276 Fifth Avenue, Suite 501
New York, New York 10001
Tel: 212.689.3858
Fax: 212.689.0669
ying@staffordesq.com

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The Speedy Trial Act

Once a defendant makes a *prima facie* showing that more than 70 days have passed between arraignment and trial, the government bears the burden of proving sufficient excludable time. *United States v. Sobh*, 571 F.3d 600, 602 (6th Cir; 2009). The government has not met its burden. Instead of assuming any responsibility for making sure that the trial started on time, the government seems to assign the power to control the trial date to Basciano. It posits that he had the power to effectively suspend the Speedy Trial Act, as well as all the responsibility for moving the case to trial.

While long on vitriol, the government's response is short on law. Other than a two-week period in December 2006, it does not show that any other delay we identified ought to be excluded under the Speedy Trial Act from the 70-day calculation. It complains mightily about defendant's pre-trial motions, but this is a diversion. We did not count any of the delays attributable to defendant's motions in our list of un-excludable time.

The government's principal contention is that, by virtue of the court's acquiescence in the defendant's request at arraignment six years ago to designate the case as "complex," the speedy trial clock never started running. According to the government, the speedy trial clock was unplugged at arraignment, has remained unplugged, and will remain in that state until whenever trial begins. This argument is contrary to the law and unsupported by the record.

In essence, the government's central argument is that, by seeking the "complex" case designation, defendant either effectively opted out of the Speedy Trial Act or waived any right to complain about violation of the Act, and/or that, by designating the case "complex," the court had no further obligation to justify any "ends of justice continuance" and both the court and the government could proceed on the assumption that the Speedy Trial Act could be disregarded.

This is no different from the views taken by the government -- but rejected by the Supreme Court --in *Zedner v. United States*, 547 U.S. 489 (2006) (a case initially arising in the EDNY). There, in no uncertain terms, the Court plainly rejected the "blame-the-defendant" tactic and the government's endorsement of open-ended rulings by the trial court:

> The exclusion of delay resulting from an ends-of-justice continuance is the most open-ended type of exclusion recognized under the Act and, in allowing district courts to grant such continuances, Congress clearly meant to give district judges a measure of flexibility in accommodating unusual, complex, and difficult cases. But it is equally clear that Congress, knowing that the many sound grounds for granting ends-of-justice continuances could not be rigidly structured, saw a danger that such continuances could get out of hand and subvert the Act's detailed scheme. **The strategy of § 3161(h)(8) [now (7)], then, is to counteract substantive open-endedness with procedural strictness. This provision demands on-the-record findings and specifies in some detail certain factors that a judge must consider in making those findings.**

Id. at 508-9.

Zedner emphasized that, under the Act, a district court, when it grants an "ends-of-justice" continuance, must set forth, in the record, its reasons finding that the ends of justice are served and outweigh other interests. Moreover, the Court held that this requirement is not satisfied by a district court's "passing reference to the case's complexity". Id at 507. It concluded, "A straightforward reading of these provisions leads to the conclusion that if a judge fails to make the requisite findings regarding the need for an ends-of-justice continuance, the delay resulting from the continuance must be counted, and if as a result the trial does not begin on time, the indictment or information must be dismissed. " Id at 508.

The record in this case spans more than 6 years, and yet the government has not pointed to a single on-the-record statement of the court's reasons for finding that "the ends of justice served by the granting of a continuance outweigh the interests of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(7)(A). Even on the isolated occasions where the record reflects any attention to the Speedy Trial clock, and an attempt to stop it (see, e.g., minute entries on March 1, 2005, ecf document # 11 ("Start Date: 3/01/05 Stop Date: 3/17/05"), and March 16, 2006, ecf document # 166 ("Time is excluded from today until April 21, 2006 under the STA")), the record is barren of findings. As we noted in our moving papers, *Zedner* teaches that none of this time should be excluded, but we did not even count the periods identified on the docket sheet as "excluded" in the 360 days of un-excludable time.

"In ruling on a defendant's motion to dismiss, the court must tally the unexcluded days. This, in turn, requires identifying the excluded days." *Zedner,* 547 U.S. at 507.

We identified some 360 days that could *not* be excluded. As noted, the government relies principally on the faulty argument that there was a blanket exclusion of time by virtue of the court's designations of the case as "complex" at arraignment and then again in November 2005. In addition, the government seeks to justify the exclusion of four particular periods between December 1, 2006 and June 8, 2010 (totaling 156 days) that we identified as not excludable in our moving papers. With one exception (the exclusion of the two week period between December 1- December 15, 2006 for *Curcio* proceedings), its subsidiary arguments in this regard are, again, contrary to the law. They are also based on misstatements of the record.

1. The government posits that the 24 days between April 3, 2008 and April 28, 2008, are excluded because, on March 13, 2008, the court granted defendant's motion to extend the time for filing pretrial motions to May 16, 2008. The government is wrong as a matter of law. In *Bloat v. United States*, 130 S.Ct. 1345 (2010), the Supreme Court held unequivocally:

> The time granted to *prepare* pretrial motions is not automatically excludable from the 70-day limit under [18 U.S.C. § 3161] subsection (h)(1). Such time may be excluded only when a district court grants a continuance based on appropriate findings under subsection (h)(7).

(Emphasis in original.)

This Court did not grant a continuance based on appropriate findings under subsection (h)(7) when it granted defendant's request to extend the time for filing motions; it simply wrote "Application granted. So ordered. 3/13/08" on the letter request. Accordingly, the time allowed for the preparation of the pretrial motions is not excluded under the Speedy Trial Act. See also, *United States v. Oberoi*, 547 F.3d 436, 451 (2d Cir. 2008) ("In light of these considerations, we hold that the time for pretrial motions to be prepared can be excluded pursuant to subsection (h)(1), *so long as the judge expressly stops the speedy trial clock for that purpose*.") (Emphasis added.)

2. With respect to the two appeals to the Second Circuit (the recusal mandamus in 2008 and the interlocutory double jeopardy appeal in 2009), we allowed that the speedy trial clock stopped while these matters were pursued, and started counting again after the matters were decided. In the case of the mandamus petition, because this Court (in an Order entered on 4/28/08) had expressly excluded time "for purposes of the Speedy Trial Act until thirty days after the Second Circuit Court of Appeals issues a decision on the Petition for Writ of Mandamus," we began counting on July 11, 2008 – i.e., thirty days after the Circuit denied the petition, which it did in an order dated June 11, 2008. In the case of the double jeopardy appeal, this Court said nothing about the Speedy Trial Act. By Order dated June 4, 2009 (and filed on June 5, 2009, ecf document # 708), it postponed jury selection (which had been set for October 5, 2009) "until no sooner that 30 days after a decision by the Second Circuit in the pending double jeopardy appeal," but said nothing about the Speedy Trial Act in that Order. The Circuit rendered its decision on March 23, 2010, and, because no delays thereafter were attributable to the interlocutory appeal, we started the clock again on March 23.

With respect to the mandamus petition, the government maintains that the thirty days referenced in the court's order[1] should be measured from day the Circuit either issued its opinion (September 17, 2008) or its mandate (October 1, 2008), not June 11, 2008, the date of the

[1] The April 28, 2008 order provides:

> Counsel for Defendant Vincent Basciano informed the court that Basciano intends to file a Petition for Writ of Mandamus with the Second Circuit Court of Appeals regarding this court's denial of his motions for the court's recusal. As a result, Basciano, on consent of the Government, moved to stay proceedings in this case until after the Second Circuit decides the Petition. Basciano's motion to stay is GRANTED. All pre-trial motion deadlines are suspended pending resolution of the Petition. On consent, time is excluded for purposes of the Speedy Trial Act until thirty days after the Second Circuit Court of Appeals issues a decision on the Petition for Writ of Mandamus.

Circuit's Order denying the petition. This argument is directly contrary to an explicit order of the Second Circuit – an order that is not cited in the government's memo. By Order dated August 1, 2008, the Circuit wrote, "For purposes of the district court's order of April 28, 2008, staying proceedings `until after the Second Circuit decides the Petition,' **the petition for mandamus should be considered to have been decision upon the issuance of the Court's June 11, 2008 order**." (Emphasis added.)

With respect to the double jeopardy appeal, the government does not simply ignore the record. It distorts it. Thus, the government argues that the speedy trial clock did not start running again until the Second Circuit's decision became "final", which, it argues, did not occur until the Circuit issued its mandate on June 30, 2010. This argument is not supported with any reference to language in the Speedy Trial Act, or any case law involving the Speedy Trial Act. Rather, the government's argument is constructed out of whole cloth.

The word "final" does not appear in 18 U.S.C. § 3161(h)(1)(C), the section that excludes periods of "delay resulting from any interlocutory appeal." The government finds it in a letter motion filed by Basciano on June 3, 2009, in which defendant sought an "order declaring that the Court currently lacks jurisdiction with respect to the three counts that are a subject of the double jeopardy appeal, and for a stay of trial until the double jeopardy appeal is final." The government latches onto this word "final", and then makes the misleading and erroneous assertion that this court "granted the motion." In doing so, the government wants to make it seem that, by granting the requested relief, the court necessarily stopped the speedy trial clock until the decision of the Circuit became "final." It then goes on to find law dealing with the meaning of the term "final." Relying on an unpublished decision of the Second Circuit (*United States v. Spencer*, No. 00-1609, 83 Fed. Appx. 391, 394 (2d Cir. 2003), that had nothing to do with the

Speedy Trial Act, the government rounds out its argument with the assertion that the Circuit's decision did not become "final" until its mandate issued.[2]

The fly in the ointment, however, is that this Court did not grant defendant's motion for a stay of trial "until the double jeopardy appeal is final." To the contrary, concerned that the trial proceed expeditiously and not be postponed any more than necessary to protect defendant's constitutional right "not to be put twice in jeopardy," the Court agreed only to postpone jury selection "until no sooner than 30 days after a decision by the Second Circuit in the pending double jeopardy appeal." (Order dated June 4, 2009, ecf document # 708). The Court said nothing about the Speedy Trial Act in the order, and nothing about finality. The interpretation of the term "final judgment" in Rule 33 provided by the Court in *Spencer* is utterly beside the point.

Since more that 70 days of non-excludable time has passed since arraignment, the indictment must be dismissed. The dismissal under the Speedy Trial Act should be with prejudice for the reasons discussed below.

Sixth Amendment Right To A Speedy Trial

Though the length of the delay is a factor that must "weigh heavily" in the Court's balancing process under *Barker v. Wingo,* and though the length of the delay here is extraordinary, the government hardly mentions it as a factor for the court's consideration. Instead, it urges the court to focus on which party is "responsible" for delay. But it sets this up as a "heads I win, tails you lose" exercise. It insists that any delay attributable to its strategic and tactical decisions must be discounted because it made the decisions in good faith, but any delay attributable to the defendant's motions (even if the motions were made in good faith, were prompted by actions taken or legal mistakes made by the government, and were ultimately meritorious) should be counted against him. This is not right.

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[2] *Spencer* involved the jurisdictional time limit for a new trial motion under Rule 33. Prior to 1998, Rule 33 provided that a "motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment." The Court construed this statutory term "final judgment" as referring to the date when the Court of Appeals issues its mandate.

We argued that much of the delay was attributable to the tactical and strategic decision of the U.S. Attorney to return two separate indictments against defendant when, indisputably, the charges in the '05 indictment could have been included in a superseding indictment in the '03 case and vice versa. We argued that *even if legitimate*, this decision was costly in terms of the delay it engendered, and, ultimately, did not justify the extraordinary length of the delay in this case. For example, more than twenty months (from July 14, 2008 to March 23, 2010) was consumed with litigating the double jeopardy issue; after two trials in the '03 case, defendant's resources were exhausted and new counsel needed to be appointed in the capital case and had to take the time necessary to familiarize himself with an extensive body of materials already digested by prior counsel; 6 months of delay could have been avoided had the prosecutors not taken positions relating to Dominic Cirillo and Nicky Cirillo in the '03 case that worked to hide Mr. Stern's conflict of interest because of his prior representation of Dominic Cirillo.

The government does not come to terms with the effects of its strategic decisions. Rather, it defends on the ground that, in other contexts, this Court has previously rejected Basciano's "broad-brushed theories of prosecutorial manipulation." Previously, this Court may have declined to second-guess the prosecutors' discretionary charging decisions, but it has also recognized the undisputed fact that the charging decisions were made for tactical advantage. See, e.g., Memorandum & Order, January 12, 2012, p. 18 ("Even if the Government did intentionally separate the charges for a tactical advantage, the conspiracy to murder and murder of Frank Santoro was found beyond a reasonable doubt by a jury in Basciano I.") The Court was never previously asked and has never previously found that these tactical decisions had no effect on the length of delay in bringing the defendant to trial. Nor could it.

The government's attempt to lay all responsibility for the delay at the feet of the defendant is as misguided as its attempt to absolve itself of all responsibility for any of the delay or any obligation over the past six years to oversee compliance with the Speedy Trial Act and to move the case forward to trial. The government declares: "virtually all of the delays in these proceeding, and all of the adjournments of trial, are attributable exclusively to Basciano himself." Is the government actually suggesting that, because Basciano moved to dismiss the RICO count on double jeopardy grounds, because Basciano sought an interlocutory appeal when this court erroneously denied the motion, and because Basciano sought a stay of the trial while he pursued that appeal, he is responsible for the more than twenty months (from July 14, 2008 to March 23, 2010) that was consumed with litigating the double jeopardy issue? It was the government's prosecutors who returned an indictment that violated the constitution, and it was the prosecutors who, lacking a basic understanding of double jeopardy principles, generated additional and unnecessary litigation by virtue of their insistence that the appeal was "frivolous."

Yes, Mr. Basciano has filed numerous motions in this case that have been time-consuming. And yes, Mr. Basciano's counsel needed time to prepare because the case is, indeed, extraordinarily complex. But to repeatedly call these motions "frivolous" reflects over-zealousness. If the motions were so frivolous, the government should have been before the court asking for them to be decided, not sitting on its hands content to let the start of trial be delayed.

The government has all but ignored the import of the defense prejudice argument by virtue of its inability to find potential exculpatory witness Berte, the witness who might well put the lie to the notion that it was Basciano rather than Massino who actually originated the idea to murder a prosecutor. That Berte is avoiding us is not the issue. The government ignores the fact that it was the delay in the disclosure of Berte's revelation to another witness that impedes our ability to find him and secure his presence. The government has pointed to no privilege Berte might assert to avoid testifying if we could get him to the stand under oath. The government ignores its own misconduct in delaying the disclosure of exculpatory information.

Again, we say in conclusion, justice was served by the '03 prosecution. The '05 case violates the Speedy Trial Act and the Constitution and, therefore, the indictment should be dismissed with prejudice.

Dated: New York, New York
January 28, 2008

Respectfully Submitted,
George Goltzer, Esq.
Richard Jasper, Esq.
Ying Stafford, Esq.